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MICROSOFT CORPORATION

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MICROSOFT CORPORATION, a
Washington corporation

Plaintiff,

v.

M. MEDIA, a business entity of
unknown form d/b/a METRO
MEDIA, METRO MEDIA USA,
and/or QUINMART and/or f/k/a LA
METRO MEDIA INC.; SHENG TI
LEUNG, an individual; and DOES
1-5,

Defendants.

Case No. 2:17-cv-00347-MWF-AJW

**PLAINTIFF MICROSOFT
CORPORATION'S NOTICE OF
MOTION AND MOTION FOR LEAVE
TO SEEK LIMITED DISCOVERY
AFTER DEFAULT BY DEFENDANTS**

Hearing Date: June 26, 2017

Time: 10:00 a.m.

Judge: Honorable Andrew J. Wistrich

Courtroom: Roybal Federal Building and
United States Courthouse, Courtroom
690, 6th Floor

PLEASE TAKE NOTICE that on June 26, 2017, at 10:00 a.m., or as soon as
the matter may be heard¹ in the courtroom of the Honorable Andrew J. Wistrich,
Plaintiff Microsoft Corporation ("Microsoft") will, and hereby does, make this
motion for leave to serve limited discovery under Federal Rule of Civil Procedure

¹ Defendants in this action have never appeared in this action and their default
has been entered. If this Motion is motion is treated as unopposed, and granted
prior to the hearing date of June 26, 2017, Microsoft will promptly proceed with
discovery.

1 26(d)(1) on an online marketplace and a payment service provider used by
2 Defendants who have defaulted.

3 Defendants have refused to appear or participate in this action, denying
4 Microsoft the opportunity to hold a conference with them pursuant to Rule 26(f) of
5 the Federal Rules of Civil Procedure. Thus, Microsoft has been prevented from
6 serving discovery concerning Defendants' trafficking in counterfeit Microsoft
7 items. Without discovery, Microsoft cannot identify any other individuals who
8 worked with Defendants to distribute counterfeit Microsoft items or the persons
9 from which Defendants purchased the counterfeit items. Microsoft needs this
10 information to determine whether additional defendants should be named in this
11 action and combat the piracy of its software. Subpoenas served on an online
12 marketplace and a payment service provider used by Defendants will likely reveal
13 such information. Microsoft therefore requests the Court's leave to seek such
14 discovery prior to filing a motion for default judgment.

15 This motion is based on this Notice of Motion and Motion, the Memorandum
16 of Points and Authorities, the accompanying declaration of Audra Mori and its
17 exhibits, the records and files in this action, and any other matter the Court may
18 consider.

19
20 DATED: March 22, 2017

PERKINS COIE LLP

21 By: /s/ Audra M. Mori
22 Audra M. Mori

23 Attorneys for Plaintiff
24 MICROSOFT CORPORATION
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants M. Media and Sheng Ti Leung (collectively, “Defendants”) are in default. Microsoft has been denied the opportunity to utilize the traditional discovery process to obtain information regarding Defendants’ trafficking in counterfeit Microsoft items, such as the identities of other individuals involved in Defendants’ illegal activities and persons from which Defendants purchased counterfeit Microsoft items. Microsoft needs this information to determine whether additional defendants should be named in this action and to combat the piracy of its software. This information will likely be revealed by subpoenaing an online marketplace and a payment service provider that Defendants used to traffic in counterfeit Microsoft items. Microsoft therefore requests leave to serve such discovery.

II. BACKGROUND

Defendants are in the business of distributing counterfeit Microsoft items, despite being on notice of such misconduct. By means including but not limited to a letter dated July 2, 2010, Defendants were warned about distributing counterfeit copies of Microsoft software. (Complaint ¶ 16.) In 2015 and 2016, customers also notified Defendants that the purported Microsoft software and/or components that Defendants were distributing were suspicious. *Id.* Nevertheless, in August 2016, Defendants distributed to an investigator an unauthorized copy of Microsoft Office 2016. *Id.* ¶ 17. In September 2016, Defendants also distributed to an investigator a purported Windows 7 Certificate of Authenticity Label, which was analyzed and determined to be counterfeit. It was also reported to Microsoft that Defendants distributed other counterfeit components of Windows 7 software in 2016. *Id.* ¶ 18. Defendants used an online marketplace, Bonanza.com, and a third-party payment service provider, PayPal, Inc. (“PayPal”), when they trafficked in counterfeit

1 Microsoft items. Declaration of Audra Mori (“Mori Decl.”) ¶¶ 2, 4, Exs. A, B.
 2 (screen captures indicating that Defendants use these third party services).

3 On January 17, 2017, Microsoft sued Defendants to put a stop to their
 4 unlawful conduct, including claims for copyright and trademark infringement in its
 5 Complaint. Microsoft served Defendants on January 30, 2017. Defendants did not
 6 respond to the Complaint or participate in the action in any fashion. Upon
 7 Microsoft’s request, the clerk entered default on February 28, 2017. The same day,
 8 the Court issued an Order to Show Cause re: Default Judgment Motion requiring
 9 Microsoft to file a default judgment motion or appear for a hearing on April 3,
 10 2017. Microsoft is responding to that Order, asking for time to allow Microsoft to
 11 conduct the requested limited discovery.²

12 Microsoft requests leave to serve discovery so that it has the ability to
 13 address Defendants’ misconduct more fully. Specifically, Microsoft requests leave
 14 to subpoena the online marketplace, Bonanza.com, and the payment service
 15 provider, PayPal, Inc., so that it may identify individuals who were involved in
 16 Defendants’ illegal conduct and the sources from which Defendants obtained
 17 counterfeit Microsoft items. Without the requested discovery, Defendants’ default
 18 will have effectively blocked Microsoft’s ability to investigate their misconduct.

19 **III. ANALYSIS**

20 Courts allow plaintiffs to seek discovery from third parties associated with a
 21 defaulting defendant upon a showing of good cause. Microsoft meets that standard
 22 because the discovery that it seeks will allow Microsoft to obtain information
 23 concerning the identities of other individuals involved in Defendants’ illegal
 24 trafficking and sources from which Defendants purchased counterfeit items. It can
 25 determine whether any other persons should be named as defendants in this action.

26 ² Defendants in this action have never appeared in this action and their default
 27 has been entered. If this Motion is granted prior to the hearing date of June 26,
 28 2017, Microsoft will promptly proceed with discovery and prosecute this case to
 judgment.

1 Third parties like online marketplaces and payment services often deal with the
 2 type of narrow discovery sought by Microsoft and will be paid for their reasonable
 3 costs of compliance. Defendants' refusal to participate in this action should not
 4 prevent Microsoft from obtaining information relevant to their misconduct.

5 **A. The Court May Permit Discovery Without a Rule 26(f) Conference for**
 6 **Good Cause**

7 In general, a party may not seek discovery "from any source before the
 8 parties have conferred as required by Rule 26(f)" unless discovery is
 9 "authorized . . . by court order." Fed. R. Civ. P. 26(d)(1). Courts in the Ninth
 10 Circuit use a "good cause" standard to determine whether to permit discovery prior
 11 to the Rule 26(f) conference. *See, e.g., Semitool, Inc. v. Tokyo Electron Am., Inc.*,
 12 208 F.R.D. 273, 275–76 (N.D. Cal. 2002) (adopting good cause standard). Good
 13 cause exists where the need for discovery, "in consideration of the administration of
 14 justice, outweighs the prejudice to the responding party." *Id.* at 276. "If good
 15 cause is shown, early discovery may be ordered, even where a defendant has failed
 16 to appear." *Tex. Guar. Student Loan Corp. v. Dhindsa*, 2010 WL 2353520, at *2–3
 17 (E.D. Cal. June 9, 2010); *see also Antione v. Boutte*, 2016 WL 6138252, at *2, *4
 18 (M.D. La. Oct. 20, 2016) (finding good cause to seek discovery from third-parties
 19 associated with defaulting defendant because defendant's failure to appear
 20 "deprived Plaintiff of the ability to issue discovery"); *Adobe Systems Inc. v.*
 21 *Bunhey*, 2013 WL 12140304, at * 2, (C.D. Cal. Oct. 29, 2013) (granting motion to
 22 seek discovery from online marketplace, eBay, and from PayPal Inc. concerning
 23 defaulting defendants' sales of counterfeit Adobe software); *Sheridan v. Oak Street*
 24 *Mortg., LLC*, 244 F.R.D. 520, 521 (E.D. Wis. 2007) (granting plaintiff's motion to
 25 seek limited discovery from a defaulting defendant).

26 **B. Microsoft Has Shown Good Cause To Seek Discovery from Third-**
 27 **Parties Associated with Defendants**

28 In this case, there is good cause to allow Microsoft to do the third party
 discovery that it seeks. Defendants have refused to answer or participate in this

1 action, preventing a Rule 26(f) conference from occurring and foreclosing
2 Microsoft from doing discovery without leave from the Court. Discovery from the
3 online marketplace used by Defendants should reveal the names of any other
4 individuals who work with Defendants to distribute counterfeit Microsoft items.
5 Discovery from Defendants' payment service provider will likely reveal sources
6 from which Defendants obtained the counterfeit Microsoft items that they
7 distributed. The requested third-party discovery is the only way that Microsoft can
8 uncover information about Defendants' associates and the scope of their activities,
9 as Defendants will not participate in this action. *See Antoine*, 2016 WL 6138252, at
10 *4; *Adobe Systems Inc.*, 2013 WL 12140304, at * 2 (granting motion to seek
11 discovery from online marketplace, eBay, and from PayPal Inc. concerning
12 defaulting defendants' sales of counterfeit Adobe software). This information is
13 necessary for Microsoft to determine whether additional parties should be added to
14 this case before default judgment is entered, and it may also be used in the default
15 judgment motion.

16 Finally, Microsoft's discovery requests are reasonable and will not prejudice
17 Defendants. Defendants use the online marketplace and the payment service at
18 issue to facilitate commercial transactions. *See Mori Decl.* ¶ 2, Ex. A. Microsoft
19 will seek information from these third-parties specifically concerning Defendants'
20 trafficking in Microsoft items. The payment service provider at issue responds
21 regularly to subpoenas concerning those who use their services to process payments
22 for counterfeit merchandise and will provide Microsoft with a bill for the
23 reasonable costs that they incur. *See Mori Decl.* ¶ 3. Online marketplaces should
24 also have similar processes in place to address reasonable document subpoenas, as
25 they do not want their services to be abused by those who commit illegal acts. As
26 the discovery requests are directed at third-parties, there is no burden on or
27 prejudice to Defendants themselves, who have already defaulted.
28

1 **IV. CONCLUSION**

2 Microsoft has shown good cause to conduct limited third party discovery.
3 Without the requested discovery, Microsoft will be unable to determine whether
4 any other individuals should be named in this action or gain a more full picture of
5 Defendants' unlawful activities. Microsoft's discovery requests are reasonable and
6 will not prejudice Defendants. Discovery from the third parties is therefore
7 warranted.

8
9 DATED: March 22, 2017

PERKINS COIE LLP

10 By: /s/ Audra M. Mori
11 Audra M. Mori

12 Attorneys for Plaintiff
13 MICROSOFT CORPORATION
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